81-2373

Office - Supreme Court, U.S.
FILED
JUN 28 1982
ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES

.....Term, 19.....

No.

PHILLIP GAZIANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's Fourth and Fifth Amendment Due Process rights were violated when Petitioner's employee, who was acting in concert with the Government, took Petitioner's business records without consent or warrant, which records and their fruits were introduced in evidence against him.

PARTIES TO THIS PROCEEDING IN THE COURT BELOW

This action, as filed in the United States Court of Appeals for the Third Circuit, was styled United States of America v. Phillip Gaziano, Alfred Royster, Jr., and Suncrest Environmental Resources Corp., Phillip Gaziano, Appellant, at No. 81-2681. Petitioner's co-defendants below filed separate appeals denominated as United States of America v. Alfred Royster, Jr., No. 81-2682, and United States of America v. Suncrest Environmental Resources Corp., No. 81-2683, which appeals were consolidated before the Third Circuit Court of Appeals.

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The United States Court of Appeals for the Third Circuit issued a Judgment Order on May 11, 1982. A copy of this Order is contained in the Appendix at pp. 1a-3a.

On May 21, 1982, Petitioner filed a Motion to the United States Court of Appeals for the Third Circuit to stay the mandate pending this application to the Supreme Court of the United States for Writ of Certiorari.

On June 4, 1982, the Third Circuit Court of Appeals granted the Motion and stayed issuance of the mandate until July 1, 1982. A copy of the Order granting Petitioner's Motion is contained in the Appendix at p.4a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 11, 1982. Petitioner did not submit a petition for rehearing. The jurisdiction of the Supreme Court of the United States is invoked under Title 28 United States Code §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Petitioner, PHILLIP GAZIANO, (hereinafter "Gaziano"), was charged in a twenty-three (23) count indictment alleging mail fraud, commercial bribery and obstruction of justice, by conspiring with Alfred Royster, Jr., (hereinafter "Royster"), and Suncrest Environmental Resources Corporation, (hereinafter "Suncrest"), in a scheme to defraud West Penn Power Company, (hereinafter "West Penn"), Allegheny Power Systems, Inc., (hereinafter "Allegheny"), and the purchasers of electricity in the Western District of Pennsylvania and elsewhere who were customers of West Penn and Allegheny.

The indictment alleged that between 1977 to July of 1979 Gaziano and Suncrest conspired with Royster to switch coal samples provided for testing at the "Hatfield" facility, located in Masontown, Pennsylvania, in return for which Royster received approximately $41,000.00 in payments.

Evidence adduced at trial showed that Gaziano was the principal owner of Suncrest, and that Suncrest traded as a coal supplier for West Penn. Detailed description was provided for the procedures whereby coal was shipped to and received by West Penn, and how the coal was identified for later reimbursement to suppliers like Suncrest.

Suspicion by officials of West Penn regarding low prices for high quality coal offered by Suncrest caused West Penn to contact the FBI. The FBI undertook an investigation of Suncrest's coal selling practices, which resulted in the aforementioned indictment of Petitioner Gaziano and the others.

The Government offered numerous technical witnesses who testified to points of the case not here at issue.

The Government's principal testimony came from Henrietta Foster, (hereinafter "Foster"), a former secretary to Petitioner Gaziano and

Suncrest. She testified, and other evidence indicates, that in April of 1979 she became aware of a federal investigation into shipments of coal to the Hatfield Plant (Trial Transcript, page 1074), (hereinafter "TT"); a fellow employee named Lynch voiced suspicions to her that Suncrest was involved in some fraud with West Penn (TT 1071), (Suppression Transcript, page 17), (hereinafter "ST"); before going on vacation on July 1, 1979 she authorized Lynch to contact the FBI while she undertook to photocopy certain records belonging to Petitioner Gaziano and Suncrest, of which she had either become aware or participated in preparing during the period 1977-1978 and up to April of 1979 (TT 1071 ff.); she had no authorization to take these records (ST 53-55) which related to various payments of money, phone calls, corporate entries and other references that involved the alleged scheme to victimize West Penn (id.); Foster kept these records at home until a meeting

with FBI Agents and Lynch on July 17, 1979 (TT 17, 26, 53, 55), at which meeting the FBI inspected but did not take copies of these records at that time (TT 1079), (ST 24, 26, 51); on July 24, 1979 the FBI subpoenaed Suncrest's records (ST 9, 24, 29, 33); sometime around July 27, 1979 the FBI made arrangements with Foster to obtain the records previously inspected by the agents on July 17th (ST 53); on July 30th Foster furnished the FBI with these records (ST 9, 10, 34, 43); Foster remained Petitioner's secretary at Suncrest through July 24, 1979 when she quit after the Suncrest records were subpoenaed (ST 9, 24, 29, 33); in November of 1979, together with the FBI Agent, she reviewed all of the records subpoenaed by the Grand Jury on July 24th (TT 1091, 1163, 1168).

Foster testified as to certain conversations with Petitioner Gaziano pertaining to another person known as "Easy", "Al", or "Fred" and to phone numbers associated with that individual (TT

996); to arrangements for the purchase of airline tickets to New York for a Mr. Royster (TT 1008); to calls she was directed to make by Petitioner Gaziano to a telephone answering service in which she left the numbers of certain barges and time of shipment (TT 1000); to the preparation of checks used for alleged payments to "Easy" (TT 1002); to her own forging of such checks (TT 1003, 1047); and to the destruction of certain test records (TT 1024).

She was not able to identify co-indictee Royster as someone whom she had seen or to whom payments were made (TT 1005); Foster never overheard a conversation between Pettioner and Royster; significantly, she had no personal knowledge with respect to what, in fact, had ever happened at the Hatfield Plant (id.). On July 30th Foster was fitted with a body recorder by the FBI, engaged Petitioner in conversation and transcribed that conversation which concerned her proposed

appearance before the Federal Grand Jury in August of 1979 and her supposed knowledge of the Petitioner's relationship with "Easy" (ST 34).

Prior to trial, Petitioner filed a Motion to Suppress on the grounds that Foster had seized records without a warrant or consent while acting as a Government agent. The Motion was denied.

At the conclusion of the Government's case, the Court dismissed Counts 20 and 21 alleging certain obstructions of justice by Petitioner Gaziano, who then presented character witnesses and rested. Royster presented character witnesses and evidence that his father, who ran a filling station, serviced Gaziano vehicles and sometimes borrowed or loaned money to Gaziano as a convenience. He also testified that it was he who took the tickets to New York and went on a ship's cruise.

The jury returned a verdict of guilty as to all remaining counts on June 3, 1981. The Trial

Court sentenced Petitioner Gaziano to incarceration for five (5) years and to pay a total fine of $142,000.00. Suncrest was sentenced to pay a fine of $132,000.00. Royster was sentenced to incarceration for a term of three (3) years. On appeal to the United States Court of Appeals for the Third Circuit, the decision of the District Court was affirmed without opinion.

On May 11, 1982, the Petitioner timely filed a Motion To Stay Issuance Of Mandate Pending Appliation To The Supreme Court Of the United States for Writ of Certiorari.

On June 4, 1982, the United States Court of Appeals for the Third Circuit entered an Order staying issuance of the mandate in the instant case, until July 1, 1982, pending disposition of the instant Petition for Writ of Certiorari.

REASON RELIED UPON FOR THE ALLOWANCE OF THE WRIT

THE PETITIONER'S FOURTH AND FIFTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED WHEN PETITONER'S EMPLOYEE, WHO WAS ACTING IN CONCERT WITH THE GOVERNMENT, TOOK PETITIONER'S BUSINESS RECORDS, WITHOUT CONSENT OR WARRANT, WHICH RECORDS AND THEIR FRUITS WERE INTRODUCED IN EVIDENCE AGAINST PETITIONER.

The pertinent chronology of events is as follows:

1. June, 1979 - Henrietta Foster takes and photocopies records in question without permission. (Motion to Suppress Transcript, pp. 17, 26, 53, 55), (hereinafter "ST");

2. July 17th - Foster meets with FBI Agents, who inspected the documents, but did not take them, instead directing Foster hold on to them until

subpoenaed on July 24th (ST 24, 26, 51) (Trial Transcript 1079), (hereinafter "TT"). FBI Agent Geitgey testified that he didn't take the records from Foster on the 17th because he wanted to obtain a legal opinion from the United States Attorney, although he knew that they were records related to Suncrest's activities (ST 36, 38, 42, 47, 51, 52);

3. July 24th - Suncrest is served with a Grand Jury subpoena by FBI Agents, including Geitgey, for various records. On this date, Foster decides to "quit" her employment;

4. July 27th (approximately) - FBI calls Foster to bring "records"

in (ST 43). Foster had earlier testified that she just decided on her own to go to the FBI on the 30th without prior arrangements (ST 10);

5. July 30th - Foster turns over to the FBI the records which she had previously shown them on July 17th, and which she retained thereafter until July 27th, when asked to bring them in by the FBI (St 9, 10, 34, 43); and

6. August 24th - Return date of Grand Jury subpoena for Suncrest records, copies of which Foster had already made (ST 33).

As the testimony thus clearly indicates, Foster remained both Suncrest's and Gaziano's employee

between July 17th and 24th, when she quit. Moreover, as is also evident, despite its knowledge, from July 17th on, of the existence and nature of Foster's documents, the FBI actively encouraged her to hold onto and then turn over records she had misappropriated. Thus, from July 17th, continuously through the 30th of July when she finally gave up these records, Foster was sufficiently an "agent" of the Government so as to invoke the protections of the Fourth Amendment and its requirements for a warrant, consent, or justification for search (ST 28, 31).

It has been stipulated that the Government obtained these records without a search warrant or any other legal process (ST 53-55). Rather the prosecution suggested that the retrieval of these records was made by a private citizen. Thus, the Government argues any seizure by her, however illegal otherwise under Pennsylvania law, does not

implicate the Government or the Fourth Amendment.[1]

Petitioner is aware that the Fourth Amendment applies to private searches, as made here by Foster, only if the private party may be regarded as having acted as an instrument or agent for the prosecution. Coolidge v. New Hampshire, 403 U.S. 443 (1977); United States v. Sherwin, 539 F.2d 1 (9th Cir. 1976). Moreover, Petitioner is also

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1. The Government alternatively argues that Foster had authority in her position as secretary to Mr. Gaziano to retrieve and turn over such records. This position is ludicrous since there is not an iota of proof to suggest that she had any such authority, and indeed it defies credulity to suggest that any secretary would have authority to remove any records from her employer's files to give to any third party, much less the FBI in a criminal matter implicating that employer (ST 53). Moreover, the Government is no better off were it to argue that the Grand Jury subpoena, returnable August 24th, would have obtained these records, where it is clear the Government physically obtained them on July 30th before the subpoena was legally complied with. See, Wong Sun v. United States, 371 U.S. 471 (1963)

aware that there must be some degree of prosecution knowledge, acquiescence and involvement to invoke application of the Fourth Amendment. United States v. Goldstein, 532 F.2d 1305 (9th Cir. 1976).

Review of the cases demonstrates that whether a private search becomes Government action depends on a fact sensitive analysis. The Eighth Circuit for example, concluded that a two-pronged analysis of private searches must be made, analyzing the search, or viewing, aspect separately from the actual seizure, in order to determine whether there was sufficient Governmental participation. United States v. Haes, 551 F.2d 767 (8th Cir. 1977).

The Haes Court suppressed evidence where a carrier's routine opening of a package was found to be a private search which uncovered two allegedly "obscene" motion pictures, but where the search became a Governmental one when the FBI

obtained these films and "viewed" them without a search warrant. The same Court reached a similar conclusion and suppressed evidence, where books and magazines previously seized and within the control of a common carrier were examined by FBI Agents who replaced them in packages and later purchased them from Defendant's bookstore.[2] United States v. Kelly, 529 F.2d 1365 (8th Cir. 1976).

Although denying the motion to suppress on facts before it, another federal court stated the proposition involved as follows:

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2. In the instant case, the agents inspected the records on July 17, 1979,, obtained a Grand Jury subpoena which they served on July 24th for the originals of the records to be viewed, and then obtained the copies on July 30th without waiting for compliance with the subpoena (ST 43, 52).

> The timing of the search by a private citizen is critical in determining whether the government was motivating the search. If the government is already involved in the investigation and has contacted the private individual, some government encouragement may be presumed, unless there are facts rebutting this.

United States v. Bloom, 450 F.Supp. 323, at 326 (E.D.Pa. 1978). Cf. United States v. Valen, 479 F.2d 467 (3rd Cir. 1973).

Applying the Bloom rationale to the instant case, investigation of Petitioner Gaziano and Suncrest was already underway as early as April of 1979, three months before the FBI agents talked to Foster on July 17, 1979 (TT 1074-75). In any event, on that date not having taken the records, but being aware of their allegedly criminal character, "some government encouragement may be presumed" since Foster was to hold the records until a subpoena was presented to Suncrest on July 30th after she had left her employment. Cf. United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1974)

where agents had not encouraged the private individual to seize the records.

United States v. Stein, 322 F.Supp. 346 (N.D.Il. 1971), reflects the legitimate concern attendant to the protection of a subject's Fourth Amendment rights. Moreover, it sets out sensible and realistic conclusions with respect to when it should be determined that a private party has become a government "agent". The District court there concluded that where records belonging to defendants charged with mail fraud were "acquired" and turned over to the prosecution by one who may well believe that his cooperation would result in his being left out of a mail fraud indictment, the Government cannot be heard to say it was totally divorced from the situation in which the third person came into possession. In suppressing the evidence, the Court went on to say:

> There is no clear and convincing evidence that he private individual was an agent of the government at this time, but there is ample reason to believe that he thought the government would reward him for turning over these records; just as there is no clear and convincing evidence that he stole the records, but there is ample reason to believe that he might have done so.
>
> Under these circumstances, it cannot be said that the government was totally divorced from the situation under which he came into possession of these records.

Stein, id. at 348.

If anything, the facts here are more egregious. Foster knew that the FBI investigation had already begun in April (TT 1074-75); that Lynch, a co-employee, had already suspected that some criminality had occurred (ST 19); that Foster herself had participated in at least some of the alleged crimes by forging signatures to certain checks (TT 1003); and that unlike the witness in Stein, she stole the records from her employers, a fact well known to the Government. Foster thus had ample reason to believe that cooperation would result in

her being left out of any indictment (mail fraud) toward which the Government investigation was building.[3]

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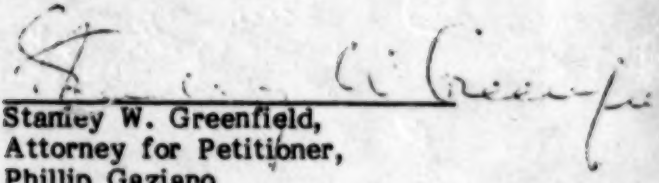
3. Foster's testimony that she was prompted to begin collecting the records in June, 1979 simply because she believed Gaziano was violating the law, although her suspicions, her own direct involvement, and the very records, each related to events over a year or more old, is ridiculous (ST 10) (TT 1071). Much more probable is the conclusion that she began pulling year old records after Lynch, her co-employee, told her of his own suspicions, which together with her knowledge that the FBI was already investigating, suggested to her that she had best take steps to protect her own interests. If truly motivated to be a good citizen as she contends, she surely would have come forward a year or more earlier when the related events of which she was aware took place, an observation the Government can't have failed to notice, if not emphasize, when deciding not to prosecute her.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

GREENFIELD & MURTAGH



Stanley W. Greenfield,
Attorney for Petitioner,
Phillip Gaziano

CERTIFICATE OF SERVICE

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

I hereby certify that on the 28th day of June, 1982, three (3) true and correct copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, were served on each of the individuals and in the manner indicated below, which service satisfies the requirements of Rule 28 of the United States Supreme Court Rules.

SERVICE BY FIRST CLASS UNITED UNITED STATES MAIL, POSTAGE PREPAID:

1. Rex E. Lee
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GREENFIELD & MURTAGH

Stanley W. Greenfield,
Attorney for Petitioner,
Phillip Gaziano

SWORN to and subscribed before me

this 28th day of June, 1982

Notary Public

My Commission Expires:

JANE C. DINDINGER, Notary Public
Pittsburgh, Alleghany County, PA.
My Commission Expires June 7, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2681

UNITED STATES OF AMERICA

v.

PHILLIP GAZIANO, ALFRED ROYSTER, JR.
SUNCREST ENVIRONMENTAL RESOURCES CORP.

Phillip Gaziano,

Appellant

(D.C. Criminal No. 81-00006-01)

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
May 10, 1982
Before: GIBBONS and HUNTER, Circuit Judges
and THOMPSON, District Judge*

---

*Hon. Anne E. Thompson, United States District Judge for the District of New Jersey, sitting by designation.

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JUDGMENT ORDER

Phillip Gaziano appeals from a judgment of sentence following a conviction for mail fraud, 18 U.S.C. § 1952, conspiracy, 18 U.S.C. § 371, obstruction of justice, 18 U.S.C. § 1510, and subornation of perjury, 18 U.S.C. § 1503. He contends:

1) that Henrietta Foster was a government agent when she took records from her

employer Suncrest Environmental Resources, Inc., and those records and their fruits should have been suppressed;

2) that the government violated Rule 6(e), Federal Rules of Criminal Procedure when it permitted Henrietta Foster to examine subpoenaed records, and that violation requires a new trial.

There is no merit to these contentions.

It is O R D E R E D and A D J U D G E D that the judgment of the district court is affirmed.

BY THE COURT,

/s/John J. Gibbons
Circuit Judge

Attest:

/s/Sally Mrvos
Sally Mrvos, Clerk

DATED: MAY 11, 1982

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

81-2681

UNITED STATES OF AMERICA

vs.

GAZIANO, PHILLIP
ROYSTER, ALFRED, JR.
SUNCREST ENVIRONMENTAL RESOURCES CORP.

PHILLIP GAZIANO,

Appellant

(D.C. Crim. No. 81-0006-01)

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 1, 1982.

/s/John J. Gibbons

Judge

Dated: June 4, 1982

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FILED
OCT 19 1982
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No. 81-2373

In the Supreme Court of the United States

OCTOBER TERM, 1982

PHILLIP GAZIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the removal of corporate records from the corporation's offices and their subsequent presentation to the FBI, all of which was carried out by a corporate employee acting upon her own initiative, constitutes an official search subject to the requirements of the Fourth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2373

PHILLIP GAZIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1982. The petition for a writ of certiorari was filed on June 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following denial of a motion to suppress evidence and a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner and co-defendants Alfred Royster, Jr. and Suncrest Environmental Resources, Inc. were each convicted of two counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 1 and 2), twelve counts of using interstate facilities in furtherance of commercial bribery, in violation of 18 U.S.C. 1952 (Counts 3-12, 16, 17), and one count of conspiracy to commit mail fraud and to use interstate facilities in furtherance of commercial bribery, in violation of 18 U.S.C. 371. In addition, petitioner was convicted of one count of attempting to obstruct the grand jury investigation, in violation of 18 U.S.C. 1510 (Count 18), and one count of attempting to suborn perjury before the grand jury, in violation of 18 U.S.C. 1503. Petitioner was sentenced to a total of five years imprisonment and fines amounting to $142,000. The court of appeals affirmed petitioner's conviction.

1. The evidence at trial showed that between late 1977 and mid-1979 Suncrest Environmental Resources Corporation sold coal to the West Penn Power Company. During that period petitioner, the owner and president of Suncrest, paid co-defendant Royster, a West Penn employee, to substitute samples of different, higher quality, coal for samples taken from the coal actually delivered by Suncrest to West Penn for use in its plant. The purpose of this scheme was to raise the price West Penn paid Suncrest for the coal, which, under the governing contracts, was dependent upon the results of a laboratory assay of the samples.

West Penn operated a coal-fueled power plant on the Monongahela River at Hatfield, Pennsylvania, and pur-

chased coal for the plant from several independent suppliers, including Keystone Coal Associates. Keystone, in turn, subcontracted West Penn's order to Suncrest (Tr. 2-6, 98-103, 168-169, 395-396).[1] Suncrest shipped the coal from mines in West Virginia by barge downriver to the West Penn plant's unloading facility (Tr. 1190, 1269-1270). When a shipment of coal arrived, West Penn employees would remove a 4000 gram "sample" of the coal from the shipment and place it in a locked "library deposit box." The sample would later be sent to West Penn laboratories, where its quality would be tested; West Penn paid a higher price for better quality coal (Tr. 10-15, 52-81, 167-175).

Although tests performed on petitioner's coal shipments during the period in question indicated that the coal was of excellent quality, West Penn employees began to suspect that the Suncrest coal actually utilized by the power plant was of poorer quality than the tests showed. The price Suncrest charged was too low for high quality coal, and the actual coal from the shipments themselves appeared to be of poorer quality; it clogged up the furnaces when burned (Tr. 179-180, 238-239, 396-398, 565-566). Accordingly, West Penn officials began to take additional samples from the barges as they came in, had them analyzed, and compared the test result with the test results of the regular "library deposit box" samples. Company officials realized that someone had been switching samples in the "library deposit box" when they discovered that the deposit box sample was of consistently higher quality than the special barge sample (Tr. 181-182, 400-403, 450-455, 566-570, 591-632, 707-720).

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[1] "Tr." denotes the trial transcript. "H. Tr." denotes the transcript of the suppression hearing.

The evidence further revealed that petitioner regularly instructed Henrietta Foster, who was employed as a secretary at Suncrest, to give the identification numbers of Suncrest barges bound for the West Penn plant at Hatfield to a man named "Fred" whenever he called. Petitioner later admitted to Foster that he had an "inside" man named Fred who worked for West Penn in the Hatfield barge unloading area and helped him with the samples (Tr. 790-791, 991-993). Petitioner would pay "Fred" for his services by issuing company checks payable to certain individuals and forging the signatures. Foster would then cash the checks and return the cash to petitioner (Tr. 1001-1007). Evidence at trial showed that "Fred" was co-defendant Alfred Royster, Jr., who worked at the Hatfield barge unloading facility. In late July 1979, after Foster was served with a grand jury subpoena, petitioner was tape-recorded admitting that he made payoffs to Royster and attempting to persuade Foster to lie to the grand jury (Tr. 1029, 1247-1248, 1272). Evidence also showed that petitioner pressured an answering service and a travel agency to destroy or alter records pertaining to Royster (Tr. 1021-1022, 1132-1145, 1158-1160).

2. Prior to trial, petitioner moved to suppress documents removed from Suncrest offices by Henrietta Foster.[2] At the suppression hearing, Foster

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[2] The government used six items obtained by Foster in preparation for its case. Four of the items (Gov't Exh. 35-38) related only to an obstruction of justice count (Count 21) that was dismissed by the district court at the conclusion of the government's case. The remaining items were a travel agency receipt (Gov't Exh. 18-A) and a list of telephone numbers and payments made to Royster (Gov't Exh. 23-4). This list was not a corporate record, but rather was a copy made by Foster of a record that she had made and maintained (Tr. 1032-1033).

testified that she took documents from the Suncrest office prior to July 1, 1979, and kept them at her home until July 17, when she showed them to FBI Agent Richard Geitgey (H. Tr. 6-7).[3] Geitgey had never met Foster before July 17 and had not requested that Foster remove the documents (H. Tr. 13). At their first meeting, after viewing the documents, Geitgey declined to accept them because he was unable to contact his superiors. Accordingly, he told Foster that they would meet again, but gave her no instructions regarding the documents (H. Tr. 12, 26, 36-37).[4] Foster took the documents back home on July 17 and quit her job on July 24, 1979 (H. Tr. 12, 24, 26). The FBI contacted Foster on approximately July 27, and Foster turned the records over to the FBI on July 30 (H. Tr. 34, 43, 9-10). The district court found that Foster did not act as a government agent in any of her actions (H. Tr. 56).

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[3] Foster's fellow employee, Jay Lynch, called Geitgey at Foster's request on June 29 and made arrangements for the July 17 meeting (H. Tr. 14-16). During the course of the conversation, Lynch explained that he and Foster wanted to show Geitgey some documents. During the July 17 interview, Foster indicated that petitioner was destroying certain records and that she was afraid that some of the documents she had brought with her were also going to be destroyed. Accordingly, Geitgey photocopied several of the documents on July 17, but did not photocopy any of the items actually introduced at trial because Foster believed that those documents were not about to be destroyed (H. Tr. 47-50).

[4] As petitioner acknowledges (Pet. 13), Foster did not assist the FBI in procuring the incriminating tape recording of petitioner (see page 4, *supra*) until after she had presented the documents to the FBI. The latter act was her initial contact with the FBI (H. Tr. 13).

ARGUMENT

Petitioner argues that Foster acted as a government agent when she turned over the Suncrest records to the FBI and that her conduct accordingly constituted an official search subject to the requirements of the Fourth Amendment. Petitioner advances two arguments in support of that claim: first, that an FBI agent instructed her to bring the records to him on July 30 after she had previously attempted to give them to him on July 17 (Pet. 19-23), and second, that she was motivated by the hope of securing beneficial governmental treatment when she first took the records from the Suncrest office (Pet. 24-26). Neither argument establishes petitioner's claim.

As petitioner concedes (Pet. 20), the Fourth Amendment applies to private searches only if the private party acts as an agent of the government. *Walter* v. *United States*, 447 U.S. 649, 656 (1980); *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921). To be sure, the government may not circumvent the Fourth Amendment by instigating searches by private parties. Nonetheless, a mere intent to assist the government or hope of reward is not sufficient to turn a private search into a government search. See, *e.g.*, *United States* v. *Newton*, 510 F.2d 1149, 1153 (7th Cir. 1975); *Meister* v. *Commissioner*, 504 F.2d 505, 508-510 (3d Cir. 1974).

In petitioner's case, there is no basis for a conclusion that the government was involved in Foster's decision to remove corporate records. There was no contact between Foster and the FBI before Foster took the records; neither did the FBI have advance knowledge that Foster would remove the documents. Moreover, there was no reason for Foster to believe that her action would curry favor with the government, since she was not informed of the FBI investigation until after she had taken the documents home.

In fact, Foster specifically denied that she had taken the documents in order to protect her own interests (H. Tr. 19-20, Tr. 1073).

Contrary to petitioner's argument (Pet. 19), the fact that Agent Geitgey did not accept the records until several days after Foster had first presented them to him did not convert her search into an official search, because Geitgey did not participate in Foster's original private search and seizure. Unlike *United States* v. *Haes*, 551 F.2d 767 (8th Cir. 1977), upon which petitioner relies (Pet. 21-22), here the government agent did not perform an additional search after Foster turned over the records, but merely accepted the results of Foster's already completed private search. Compare 551 F.2d at 771. *Walter* v. *United States*, *supra*, is similarly inapposite, because in that case the government performed an additional search by screening obscene films after receiving them in opened cartons from a private party to which they had been mistakenly delivered. See 447 U.S. at 656. See also *United States* v. *Jacobsen*, 683 F.2d 296, 298-300 (8th Cir. 1982).[5] In any event, as petitioner recognizes (Pet. 21), the determination whether an

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[5] Nor do district court decisions cited by petitioner (Pet. 22-25) support his claim. Indeed, as the excerpt reproduced in the petition (Pet. 23) makes clear, *United States* v. *Bloom*, 450 F. Supp. 323, 326 (E.D. Pa. 1978), teaches only that official participation may be presumed (and then only rebuttably) where the government "has contacted the private individual" prior to the search. It is undisputed that that did not happen here. And in *United States* v. *Stein*, 322 F. Supp. 346 (N.D. Ill. 1971), the informer who supplied documents to federal agents that were suppressed had continuing contact with the agents prior to the time he secured the documents. The district court found "a clear pattern of * * * attempts to procure [the informer's] cooperation" in securing documents of evidentiary value. 322 F. Supp. at 348. That finding fully distinguishes *Stein* from the present case.

ostensibly private search is rendered "official" is highly dependent upon the facts of a particular case. Because this case entails no more than the application of settled principles to a particular fact pattern, review by this Court is clearly unwarranted.

Further review is also unwarranted because the evidence in both of the documents used at trial in connection with counts upon which petitioner was convicted (see page 4 note 2, *supra*) duplicated other evidence presented at trial, and any error in their use was accordingly harmless. Information contained in the travel agency receipt was also included in separate records obtained directly from the travel agency (Tr. 1132-1146). Foster's testimony duplicated the information contained in the list of payoffs and telephone numbers. Foster testified that petitioner had told her that he made payoffs to Royster, and the government introduced a tape recording in which petitioner admitted making profits (Tr. 996-997, 1000-1004, 1272). Foster further testified that petitioner had given her the very telephone numbers that were contained in the documents and explained that they were Royster's phone numbers (Tr. 996-997).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 383570 1142